

(1997) 02 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 303 of 1989

Smt. Kamlesh Kumari and Others

APPELLANT

Vs

Shri Chander Mohan and Others

RESPONDENT

Date of Decision : 25-02-1997

Acts Referred:

Citation : (1997) 2 ShimLC 345

Hon'ble Judges : P.K. Palli, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Rajnish Manktala, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Palli, J.—The suit filed by the Plaintiffs-Respondents was decreed by the learned trial Court and on appeal filed by the Defendants-Appellants, the learned first appellate Court has maintained the judgment and decree passed by the learned trial Court. The Defendants are in second appeal before this Court. Parties hereinafter in the judgment shall be referred to as the Plaintiffs and the Defendants.

2. The Plaintiffs sought a decree of permanent prohibitory injunction as well as declaration that the Defendant No. 1 be restrained to construct a wall of his house which is behind the house of the Plaintiffs as well as the proforma Defendants. It was pleaded that with the raising of the construction of the wall, the light and air coming to the house of the Plaintiffs shall be blocked. It was also said that the raising of the proposed construction cannot be made without cutting the backside and eaves of the Plaintiffs' house. The Varandah of the house of the Plaintiffs opens towards the backside of their house from where they enjoy the light, air and sun bath during winter season. According to the Plaintiffs, they enjoying this right for the last more than 100 years which has now ripened into easementary right and thus the decree prayed for by them.

3. The Defendant No. 1 contested the suit Raised the plea of estoppel, Court-fee

and denied that the Plaintiffs have any easementary right. According to the Defendants, the construction of the house was started wayback in the year, 1969 and the construction work of the second storey was taken up in March, 1983. There was earlier litigation between the father of the Plaintiffs and the Defendants which suit was withdrawn. According to the Defendants, the raising of the second storey would not infringe the rights of the Plaintiffs in respect of the light, air and sun bath. It was pleaded that the Defendant No. 1 has already left his own land toward the Plaintiffs measuring 1x22 feet.

4. The learned trial Court on appreciation of the evidence placed on record by the parties held under issue No. 1 that the proposed construction would deprive the rights of the Plaintiffs being used by them in respect of the enjoyment of the property i.e. sun bath, air and light and the injury cannot be compensated by way of damages and there exists the right in favour of the Plaintiffs. On issue No. 2. it was found that the Defendant No. 1 has closed the abovesaid right of air and light to the Varandah of the Plaintiffs by raising a wall of his newly constructed house Consequently, a decree of injunction was passed in favour of the Plaintiffs and the proforma Defendants and against the Defendant No. 1 restraining him from raising further construction on the wall of his house adjoining to the house owned and possessed by the Plaintiff and the proforma Defendants. As the Plaintiffs had not specifically sought a declaratory decree for the purpose of easementary rights, the relief in this respect was declined The appeal filed by the Defendant No. 1 stands dismissed by the learned first appellate Court.

5. Mr. Sood, learned Counsel appearing for the Defendants submits that, the description of the property was not given by measurements nor any expert witness was examined in respect of the blockade of the easementary rights of the Plaintiffs and in the given situation, no decree granting blanket injunction could have been passed in favour of the Plaintiffs and against the Defendants Mr. Sood further contends that in case, the Court found that there was any infringement of the rights of the Plaintiffs, the same could be protected by laying down certain guidelines It is also contended no declaratory decree was claimed or sought and in the given situation, the decree for injunction could not have been granted.

6. Learned Counsel appearing for the Plaintiffs-Respondents in reply has adopted the same line of reasoning as has been projected by both the learned Courts below in the impugned judgments.

7. After hearing the learned Counsel for the parties and on examination of the record as well as the impugned judgments, I am unable to agree with the contention raised by the learned Counsel appearing for the Defendants All what Plaintiffs have claimed is the right to air, light and sun bath from the open side of the house of the Defendant No. 1 Besides placing on record the Jamabandi of the year 1975-76, Ex P-1, Tatima, Ex. P-2, Jamabandi of the year 1980-81, Ex P-3, and Aksh Tatima, Ex. P-4, the Plaintiffs have also placed on record certain

photographs which are Ex. P-5 and P-7 to show that they are the owners in possession of their house and by the Proposed construction as has been projected by photographs as well as other evidence on record, the Plaintiffs' right of air, light and sun bath from the back-side of the Varandah in the old house shall stand blocked. Statements made by the witnesses appearing as PW-1 and PW-2 fully supports this version. They are further corroborated by PW-3 who is an SDO. from the Municipal Committee. According to his statement, the Defendants got approved the plan of their house in the year 1984 in which some portion was shown to be lying in between the two houses of the parties. In para 10 of the judgment of the learned first appellate Court, it is recorded that it was not disputed that the old house and the new house are adjoining each other. It is further not disputed that the Plaintiffs' house is more than 100 years old. An observation has been made in the impugned judgment that in case, the Defendant is allowed to raise the second storey, it will not only block the light, air and sun bath facility, but could cause damage to the whole house it can collapse.

8. Surprisingly, the Defendants have not produced even a single witness from the locality to contradict the evidence placed on record by the Plaintiffs. So far as the claim of seeking declaratory decree is concerned, the Plaintiffs cannot be non-suited as they have sufficiently pleaded easementary rights being enjoyed by them for over 100 years. Some evidence has been led from the side of the Defendants in respect of the earlier suit. This somehow does not advance the case set-up by the Defendants. There is nothing placed on record that the father of the Plaintiff ever agreed consented to the Defendants for raising a wall to block the said right being enjoyed by them. There is no grievance in so far as the first storey construction is concerned as this in no way interferes with the abovesaid rights.

9. The learned first appellate Court had also the occasion to visit the spot and efforts were made to get the matter settled between the parties. In para 11, an observation has been made that in case, the Defendants are permitted to construct second storey by raising a wall adjoining to the wall of the Plaintiffs, then the wall and eaves of the old house were liable to be removed and only in that situation, the second storey be raised. It has also been observed that in case, the wall of the old house and eaves are removed, the entire building which is sufficiently an old structure may collapse. In my opinion, the Plaintiffs have a right to air, light and sun bath which they have successfully pleaded and proved. In fact, as per observations made in para 13 of the impugned judgment, the Defendants have already utilized every inch of their land leaving no space left vacant. The wall joins the old house of the Plaintiffs and if proposed construction is permitted to be raised, it would amount to an encroachment as well as demolition of the wall of the old house which belongs to the Plaintiffs. This would further amount to denial to the Plaintiffs of their right of air, light and sun bath.

10. Both the learned Courts below have arrived at a just and proper decision

which calls for no interference in second appeal No other point has been stressed. The appeal is thus ordered to be dismissed with no order as to costs.